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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

TOBY F. POLINGER, Plaintiff and Appellant, v. DELTA AIR LINES, INC., et al., Defendants and Respondents.	B204958 (Los Angeles County Super. Ct. No. BC334375)

APPEAL from judgments of the Superior Court for the County of Los Angeles. Elizabeth Allen White, Judge. Judgments in favor of Telair International, Inc. and The Boeing Company affirmed; judgment in favor of Delta Air Lines, Inc. reversed and remanded.

Greene, Broillet & Wheeler, Mark T. Quigley, Alan L. Van Gelder; Esner, Chang & Ellis, Stuart B. Esner and Holly N. Boyer for Plaintiff and Appellant.

Reily & Jeffery and Janine K. Jeffery for Defendant and Respondent Delta Air Lines, Inc.

Perkins Coie and Ronald A. McIntire for Defendant and Respondent The Boeing Company.

Morrison & Foerster, Don G. Rushing, William V. O'Connor and Ellen F. Nudelman for Defendant and Respondent Telair International, Inc.

SUMMARY

Toby Polinger was injured while loading cargo on a 767-300 aircraft at the Ontario airport. He sued The Boeing Company (the designer and manufacturer of the aircraft and its cargo loading system), Delta Air Lines, Inc. (the aircraft operator), and Telair International, Inc. (successor to the manufacturer of component parts for the aircraft's cargo loading system). Each defendant sought summary judgment on different grounds, and the trial court granted each defendant's motion. We conclude that:

(1) Telair was entitled to summary judgment because Telair did not assume its predecessor's liability for components manufactured before the closing date of their asset purchase agreement.

(2) Boeing was entitled to summary judgment on Polinger's product liability claims based on failure to warn and defective design of the cargo loading system, because (a) Delta, DAL Global Services (Polinger's employer) and Polinger were sophisticated users of the cargo loading system who knew or should have known about its potential dangers, and (b) Polinger could not prove that a design defect caused his injuries.

(3) The trial court erred in granting Delta's motion for summary judgment. Delta's motion was based on its claim that Polinger was Delta's "special employee" whose exclusive remedy against Delta was through the workers' compensation system, but Delta did not meet its burden to show, as a matter of law, that a special employment relationship existed.

FACTUAL AND PROCEDURAL BACKGROUND

Polinger filed this lawsuit against Delta, Boeing, Telair and others seeking damages for injuries he sustained in November 2003 while loading cargo containers on a Delta B767-300 aircraft. Polinger was employed by DAL Global Services (DGS), a separate entity which contracted with Delta to provide ground services, including cargo loading, to Delta. Polinger applied for and received workers' compensation benefits as a result of the accident. His subsequent lawsuit asserted a claim for negligence against Delta, and product liability claims (strict liability and negligence) against Boeing and Telair.

We begin with a description of the cargo loading system, Polinger's work, and the accident, and then turn to this lawsuit and the bases for the three summary judgment motions. Other relevant facts will be related at appropriate points in our discussion of the merits of each of the motions.

A. The cargo loading system, the plaintiff and the accident.

The cargo loading system on 767-300 aircraft is a conveyor-based system that moves cargo containers, weighing in excess of 2,000 pounds, through the cargo hold of the aircraft on rollers powered by "power drive units" or PDUs. The movement of the PDUs is controlled with the use of a pendent control box, which is attached to the aircraft with a long cord, allowing the operator to move in and out of the aircraft while operating the controls. The control box has a series of directional switches which, when pressed, activate the PDUs, causing them to move in various directions. When a switch is released, it automatically returns to its center position and the PDUs governed by that switch come to a stop. Transverse guides (also called lateral guides or locks) in the cargo hold keep the cargo containers from moving out of position during flight. When the PDUs in the area are activated, the transverse guides automatically lower into the floor of the aircraft, allowing the containers to move on the rollers through the cargo hold.

The system is designed so that the operator can load the cargo from outside the plane. One of the benefits of the design is keeping the operator from being exposed to hazardous conditions inside the cargo hold that are created when the cargo loading system is engaged. At times, cargo containers get jammed in the system. When this occurs, the operator or another person has to enter the cargo hold and get the jammed container back on track.

On the day of the accident, Eric Lopez was operating the system, and one of the cargo containers got jammed. Lopez asked Polinger to help him un-jam the system. Polinger went into the cargo hold, while the system was off, and tried to push the container a few inches forward, "so that the roller would then catch again and continue the container." There were straps at the front of the cargo container; Polinger pulled these to straighten the container. Then, "the next thing I know, the lock [transverse

guide] started lowering and grabbed my foot." When the lock went down, "the bottom of the lock snagged the outside of [his] boot" and pulled his foot down into the system. Polinger yelled to Lopez to "shut it off," and heard Lopez saying "[i]t won't turn off. It won't turn off." Polinger later said he was "unable to free [himself] from the guide/lock before the cargo container crushed [his] foot."[1] Polinger completed an "incident report" in which he stated: "While trying to free an LD-2 [cargo container], ramp agent Eric Lopez started the roller, pinning the right foot between the guide lock and position 7 floor." Polinger checked boxes for "equipment" and "human error" where the form requested identification of factors contributing to the injury, and, in explanation of how the factors contributed to the event, stated, "Rollers did not shut off."[2] After the incident, Polinger was assisted back to his office, and took off his boot (but not his sock) to see if his foot was bleeding, because it felt very hot. He did not seek medical care that day, but did so three days later.

At the time of the accident, Polinger was employed by DGS as "ramp supervisor, operations and training supervisor," and was the highest ranking DGS employee at the airport that day. Polinger had worked for DGS as a ramp supervisor since April 13, 2000, and had used Delta's cargo loading system over 1,000 times. Polinger, who was 29 at the time of the accident, also had prior experience as a ramp supervisor. He began

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[1] At his deposition, Polinger said, "When I nudged the container, I noticed that it was misaligned so I told Eric Lopez to back it up. And then he backed it up and then I said 'stop' and then it stopped and then that's when the lock went down and grabbed my foot." When asked what he believed happened that caused the lock to go down, Polinger replied, "A malfunction of the airplane."

[2] In the "workers' compensation patient history form" Polinger prepared on March 16, 2004, his description of the injury was this: "While inside the cargo compartment of a 767 the[re] was a cargo container stuck (approx. 1500 lbs). After freeing the container a fellow employee engaged the conveyor system. The container horizontally crushed my foot approx. ¾ to 1 ¼ inches on each side. While that was happening, I was attempting to forcefully pull my foot out." When deposed, Polinger responded affirmatively to the question whether the statement was "accurate as far as it goes."

working for Delta as a skycap at the age of 16; when he was 20, he "started to work the ramp at Delta," and did so for two years or so. He left Delta for a company that contracted with Delta (ITS), where he was hired as a supervisor, and worked at ITS until it lost the contract; then he was hired by DGS as a supervisor. Polinger received training on the use of Delta's cargo handling system at least twice: when he was a ramp agent at Delta at age 20, and again while he was working for DGS. He received training on what to do when a container got stuck, but said it was "very minimal." Delta "just explained how to – depending on the situation, how to move a container if it was crooked or how to line it up or how to bring it back, things like that."

At the beginning of 2003, Polinger became a trainer himself, including training on Delta's cargo loading system, and trained "hundreds of people." He had to take a special course from Delta to become a trainer. He trained DGS personnel on how to get a container unstuck, but insists he never received any training, warning, or instruction on how to safely un-jam the system without getting caught in the transverse guides.

The cargo handling system on the aircraft was designed by Boeing by 1980, and the plane in which the accident occurred was delivered to Delta in 1987. This was the first accident known to Boeing in which an individual was injured by getting his or her foot caught in a transverse guide (although there was a finger amputation, in a case in which a ramp agent had her fingers between the containers and the locks when another agent accidentally moved the container in the wrong direction).

B. The lawsuit and the bases for the defendants' summary judgment motions.

Polinger's second amended complaint alleged that Delta was negligent in failing "to design, construct, install, own, operate, maintain, inspect, repair and replace" the aircraft and cargo loading system in a reasonably safe manner, and in failing to warn against "a non-obvious and concealed trap," failing to properly supervise and train its employees and independent contractors, and so on. As to Boeing and Telair, Polinger alleged they designed, manufactured and distributed the aircraft and cargo loading system (or components) which contained design and/or manufacturing defects rendering the

system or components unsafe and dangerous, and also failed to provide adequate warnings or instructions to users concerning the significant dangers associated with the system and its component parts. Telair had purchased the PDU product line from Honeywell International Inc. in December 2000, and Polinger sued Telair on the theory that Telair assumed Honeywell's liability as manufacturer of the allegedly defective PDUs.[3] The complaint alleged that Boeing and Telair were aware the system was "inadequate to protect operators from foreseeable malfunctions, which allowed operators appendages to become lodged in the conveyor system," and knew of the availability of safer, affordable alternative designs for the aircraft and conveyor system.

Telair, Boeing and Delta each brought motions for summary judgment, as follows:

- Telair sought summary judgment on the ground that (1) the asset purchase agreement under which it bought Honeywell's PDU product line unambiguously showed that Telair did not assume liability for PDUs manufactured before the closing date in December 2000; and (2) in any event Polinger had no evidence from which he could identify which component allegedly malfunctioned and which manufacturer built the allegedly defective part.
- Boeing sought summary judgment on the grounds that:
    - Boeing owed Polinger no duty to warn of any alleged danger because (a) the alleged danger was open and obvious, (b) Polinger, DGS and Delta were all sophisticated users of the cargo handling system, and (c) Polinger could not show causation because he knew of the alleged danger associated with use of the system and knowingly proceeded in the face of the danger.
    - Polinger's claim of a design or manufacturing defect failed as a matter of law because Polinger (a) could not identify the manufacturer of the parts of the cargo handling system he alleged were defectively designed or

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[3] Polinger also sued Honeywell, but dismissed Honeywell from the lawsuit on October 19, 2007.

manufactured, and (b) could not prove any such product defect caused his injuries.

- Delta sought summary judgment on the ground that Polinger was Delta's "special employee" at the time of the accident, as a consequence of which Polinger's remedies against Delta were governed exclusively by the workers' compensation scheme.[4]

C. The trial court's rulings.

The trial court granted all three motions for summary judgment. The court concluded that Telair's asset purchase agreement with Honeywell clearly stated that Telair assumed liability only for goods manufactured or shipped by Telair after the closing date of the agreement. Boeing did not owe Polinger a duty to warn because the alleged danger was known to plaintiff and was open and obvious. In addition, Boeing's alleged failure to warn did not cause Polinger's injuries because Polinger knew of the danger and proceeded in the face of the known danger. Further, Polinger's claims based on a design or manufacturing defect failed as a matter of law because, among other things, Polinger could not identify the manufacturer of the parts of the system he alleged were defectively designed and/or manufactured, and could not prove that Boeing's specifications for the cargo handling system showed a design defect.[5] Finally, the court found Delta was entitled to judgment because Polinger was Delta's special employee at the time of the accident.

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[4] Delta alternatively sought summary adjudication of several issues, but these were not addressed by the trial court and are not at issue on this appeal.

[5] The trial court also stated that Polinger could not prove that (1) any claimed defect in the cargo handling system was attributable to Boeing; (2) a defect existed when the product was first manufactured or sold, and that there had been no material alterations to the product since that time; (3) the product at the time of the accident was substantially similar to the product at the time of delivery, 16 years earlier; and (4) any product defect attributable to Boeing caused his injuries.

Judgments were entered in favor of Telair, Boeing and Delta, and Polinger filed timely appeals from each of the judgments.

DISCUSSION

We conclude the trial court properly granted summary judgment in favor of Telair and Boeing, but erred in concluding Delta was entitled to summary judgment. We briefly summarize the principles guiding the grant or denial of summary judgment, and then discuss each ruling in turn.

A. Summary judgment principles.

A defendant moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. "The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence – as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849, 855, fn. omitted.) Once the defendant has presented evidence that plaintiff cannot establish an element of his or her cause of action, or that there is a complete defense, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact as to the cause of action or defense. (*Id.* at p. 849.) Our review of the trial court's ruling is de novo. (*Village Nurseries, L.P. v. Greenbaum* (2002) 101 Cal.App.4th 26, 35.)

B. Summary judgment in favor of Telair was proper.

Polinger's causes of action against Telair were premised on an alleged defect in a component of the cargo loading system – the PDUs – manufactured by Honeywell, and on its assertion that Telair assumed Honeywell's liability for PDUs manufactured by Honeywell when it purchased the PDU product line in December 2000. We agree with the trial court that the terms of the asset purchase agreement between Telair and Honeywell unambiguously show Telair did not assume such liability.

The general rule of successor liability, as pertinent here, is that where one corporation sells its assets to another, the buyer does not assume the liabilities of the seller, unless the buyer expressly or impliedly agrees to assume those liabilities. (*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 28.) In this case, the provisions of the Honeywell/Telair asset purchase agreement show:

- Honeywell's "Business" was defined as "manufacturing, selling, repairing, and overhauling power drive units [PDUs] that power cargo hold rollers of certain aircraft . . . ."
- Honeywell remained "solely liable and responsible for any and all Liabilities to the extent arising from the conduct of the Business prior to the Closing Date . . . (collectively the 'Retained Liabilities') unless the terms of this Agreement state that such Liability or obligation shall transfer to or be the responsibility of [Telair]."
- Telair agreed to be "solely liable and responsible for any and all Liabilities relating to the Business or Assets that arise on or after the Closing Date, *except the Retained Liabilities*, but including without limitation the following (the 'Assumed Liabilities'): . . . (e) Liability for any design defect or product liability including, without limitation, by operation of Applicable Law, in connection with any product or good of the Business manufactured and shipped by [Telair] on or after the Closing Date . . . ."

In our view, it is impossible to read these provisions without concluding the parties intended that Honeywell would be responsible for any product liability claims for goods manufactured before the closing date, and Telair would be responsible for product liability claims for goods manufactured on or after the closing date. Polinger, however, asserts otherwise. He does so, for the most part, by completely ignoring the fact that Honeywell's retained liabilities are expressly excepted from the liabilities Telair assumed. And, to the extent Polinger recognizes the exception for Honeywell's retained liabilities, he spuriously claims that Honeywell retained responsibility for any and all liabilities "arising *prior* to the Closing Date" and, because his claim arose *after* the

closing date, it was assumed by Telair. But the agreement does *not* say that Honeywell retained responsibility for liabilities "arising prior to the closing date"; it says Honeywell retained all liabilities "*arising from the conduct of the Business prior to the Closing Date* . . . ." That is exactly the case here: if a defective PDU on a plane delivered in 1987 caused injury to Polinger, the liability is not Telair's because the liability obviously arose from the conduct of the business – the manufacture of the defective PDU – long before the closing date.[6]

In his reply brief, Polinger suggests that "the last phrase [of the retained liabilities provision] states that Honeywell retains the described liability *unless* the Agreement provides otherwise," and that the assumed liabilities provision provides otherwise. It does not. The retained liabilities provision to which Polinger refers makes Honeywell responsible for all liabilities arising from the conduct of the business prior to the closing date "unless the terms of this Agreement state that such Liability or obligation shall transfer to or be the responsibility of Buyer." There is no provision of the agreement stating that product liability claims for goods manufactured before the closing date would "transfer to or be the responsibility of [Telair]."

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[6] Polinger claims that in *Fisher v. Allis-Chalmers Corp. Product Liability Trust* (2002) 95 Cal.App.4th 1182, the court reversed a grant of summary judgment to a successor manufacturer, "[i]nterpreting language strikingly similar to the language" in the Honeywell/Telair assumed liabilities clause. In *Fisher*, the successor manufacturer assumed "'any and all claims . . . or liabilities of any kind or nature now in existence or hereafter arising from or relating to the conduct of the business of the Electrical Products Group by Allis-Chalmers . . . including but not limited to'" several categories, and there was also a proviso that the successor manufacturer would not be responsible for specific types of claims or circumstances. (*Id.* at p. 1186, italics omitted.) But none of the specific types of claims or circumstances that were excepted from the successor's assumption of "'any and all'" liabilities "appear[ed] to apply based on the record on appeal." (*Id.* at p. 1191.) We fail to see how the "strikingly similar" language of an assumed liabilities clause has any bearing unless there is also "strikingly similar" language in a retained liabilities clause, which there clearly was not. Here, Honeywell expressly retained liabilities "arising from the conduct of the Business prior to the Closing Date" and *Fisher* is simply not relevant.

In short, Polinger's convoluted interpretation of the agreement would, if accepted, denude the "retained liabilities" provision of all meaning, and require us to read the "assumed liabilities" provision without regard to the rest of the agreement. This we cannot do. The agreement expressly states that Telair would assume liability for defects in products "manufactured and shipped by [Telair] on or after the Closing Date," and it expressly states that Honeywell remained "solely liable and responsible for any and all Liabilities to the extent arising from the conduct of the Business prior to the Closing Date" unless the terms of the agreement state that the liability "shall transfer to" Telair. No term of the agreement so states with respect to liability for products manufactured before the closing date, and accordingly the trial court properly granted Telair's motion for summary judgment.[7]

C. Summary judgment in favor of Boeing was proper.

Polinger contends Boeing did not meet its burden of proving its entitlement to summary judgment, both on his claim Boeing failed to provide adequate warnings and on his claim the cargo handling system was defectively designed. Polinger is wrong on both points.

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[7] Polinger also complains because (1) Telair submitted a declaration in response to Polinger's opposition to its summary judgment motion (to which Polinger had no opportunity to respond), stating that Honeywell had agreed to defend and indemnify Telair in this case, and that both agreed that the terms of their asset purchase agreement impose product liability on Honeywell for all PDUs sold by Honeywell or its predecessor entities prior to the closing date, and (2) "it appears that the trial court in this matter considered such extrinsic evidence," because the court observed, at the beginning of the hearing on Telair's motion, that "[t]o the extent that the provision is in any way unclear or ambiguous, the parties act consistently with the provision." But the trial court ended the discussion by concluding that "[t]he agreement is clear," and "[t]here is no ambiguity." In any event, this court's decision relies only on the plain language of the asset purchase agreement.

1. Failure to warn.

The trial court based its ruling that Boeing had no duty to warn of the danger associated with use of the cargo loading system on the ground that the alleged danger was open and obvious and known to Polinger. Polinger appeals this ruling, contending that, while he was aware it was dangerous to be in the cargo hold while the system was operating, because of unstable footing and moving cargo containers – i.e., open and obvious conditions – Boeing submitted no evidence that the *particular* danger that caused his injury (namely, "that his foot could be trapped in the gaps in the floor when the transverse guide is lowered") was open and obvious. In other words, his claim is that the particular danger that caused his injury was *not* open and obvious, so Boeing cannot escape its duty to warn on that basis. As will appear, however, we conclude that Delta and DGS, and consequently employees of DGS such as Polinger, were sophisticated users of the cargo loading system who knew or should have known about its potential dangers, including the alleged "trapping" risk posed by the transverse guide mechanism. As a consequence, Boeing was exempt from the typical obligation of a manufacturer to provide product users with warnings about the product's potential hazards. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56 (*Johnson*).)[8]

We first review the principles governing a manufacturer's liability for failure to warn, the obvious danger rule, and the sophisticated users defense, and then turn to the evidence presented by the parties.

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[8] The parties argued the "sophisticated user" defense before the trial court, but the trial court indicated that, because of its other findings, it was unnecessary to reach that issue. The Supreme Court's decision in *Johnson, supra*, 43 Cal.4th 56, adopting the sophisticated user doctrine and defense to negate a manufacturer's duty to warn of a product's potential danger, was issued on April 3, 2008, after the trial court's ruling in this case but several months before appellate briefs were filed. Polinger did not brief the issue, so this court solicited and received supplemental letter briefs. (Code Civ. Proc., § 437c, subd. (m)(2) [before affirming an order granting summary judgment on a ground not relied upon by the trial court, reviewing court must afford parties an opportunity to present their views by submitting supplemental briefs].)

a. The legal principles.

Johnson describes the relevant principles. Generally, "manufacturers have a duty to warn consumers about the hazards inherent in their products." (*Johnson, supra*, 43 Cal.4th at p. 64.) The purpose of the requirement is to inform consumers about the hazards of a product of which the consumers are unaware, "so that they can refrain from using the product altogether or evade the danger by careful use." (*Ibid.*) Manufacturers are typically held strictly liable for injuries caused by their failure to warn "of dangers that were known to the scientific community at the time they manufactured and distributed their product." (*Ibid.*) When a sufficient warning is given, a product which is safe for use if the warning is followed is not in defective condition, and is not unreasonably dangerous. (*Id.* at p. 65.)

The sophisticated user defense "exempts manufacturers from their typical obligation to provide product users with warnings about the products' potential hazards. [Citation.] The defense is considered an exception to the manufacturer's general duty to warn consumers, and . . . acts as an affirmative defense to negate the manufacturer's duty to warn." (*Johnson, supra*, 43 Cal.4th at p. 65.) Under this defense, "sophisticated users need not be warned about dangers of which they are already aware or should be aware." (*Ibid*.) Because they are charged with knowing the dangers of the particular product, "the failure to warn about those dangers is not the legal cause of any harm that product may cause." (*Ibid.*) The rationale for the defense "is that 'the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer's employees or downstream purchasers.'" (*Ibid.*) "The duty to warn is measured by what is generally known or should have been known to the class of sophisticated users, rather than by the individual plaintiff's subjective knowledge." (*Id.* at pp. 65-66.)

Johnson further explains that the sophisticated user defense evolved out of the obvious danger rule, "an accepted principle and defense in California," which provides that "there is no need to warn of known risks under either a negligence or strict liability theory." (*Johnson, supra*, 43 Cal.4th at pp. 65, 67.) Thus:

> "[T]he sophisticated user defense simply recognizes the exception to the principle that consumers generally lack knowledge about certain products, for example, heavy industrial equipment, and hence the dangers associated with them are not obvious. For those individuals or members of professions who do know or should know about the product's potential dangers, that is, sophisticated users, the dangers should be obvious, and the defense should apply. Just as a manufacturer need not warn ordinary consumers about generally known dangers, a manufacturer need not warn members of a trade or profession (sophisticated users) about dangers generally known to that trade or profession." (*Johnson, supra*, 43 Cal.4th at p. 67.)

b. The evidence.

We turn now to Boeing's evidence, some of which has already been described. To establish the sophisticated user defense, Boeing must establish that Delta and DGS, and consequently Polinger as DGS's employee, could reasonably be expected to know of the hazards posed by the cargo loading system, including the hazard of getting a foot caught or pinched in a transverse guide when the system is engaged. We note two preliminary points.

First, this is not a case involving the consumer or purchaser of a product on offer to the general public. The product in question is the cargo loading system in a Boeing 767 aircraft, and the "consumer" or purchaser of the product (and its current owner/lessee and operator) was Delta Air Lines. Delta would appear to be, virtually by definition, a sophisticated user of the aircraft and its cargo loading system.[9] To the extent it was a

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[9] Indeed, Polinger claims Delta had a role in the allegedly defective design of the cargo loading system. The evidence in connection with Delta's summary judgment/summary adjudication motion shows that, when Delta was investigating the purchase of the 767 model aircraft from Boeing in the early 1980s, its ramp services management team wanted the system to include the pendant control box that allows the operator to move in and out of the aircraft (as opposed to a joystick control attached to the aircraft); the design was unique to Delta, and Delta paid Boeing for the design change.

sophisticated user, Delta "need not be warned about dangers of which [it was] already aware or should be aware." (*Johnson, supra*, 43 Cal.4th at p. 65.)

Second, Boeing's 767 Baggage/Cargo Loading Manual for Delta Air Lines contained warnings that cargo handling personnel performing manual loading "must stay clear of moving containers," and that injury could result "from impact with containers, or from being caught between containers."[10] Boeing's evidence showed no other more specific warnings about the potential hazards of the system.

So, the question is whether Boeing was required to provide other more specific warnings to Delta – which Delta could convey to its cargo handling personnel – about the specific hazard that a foot might get caught or pinched in a transverse guide. Or, was Delta – and, as a consequence, any independent contractor or employee using the system in the course and scope of their contractual or employment relationship with Delta – a sophisticated user who could reasonably be expected to know of the hazards posed by the cargo loading system, including "the risks associated with placing a foot near a transverse guide . . . ."

We entertain no doubt that Boeing had no duty to warn Delta – or DGS or Polinger – of the "trapping" risk of which Polinger complains; Delta as an aircraft operator necessarily knew or should have known of the risks associated with the aircraft's cargo loading system. The evidence showed that Delta trained Polinger on the use of the system, Polinger took special courses from Delta to become a trainer himself, and Polinger trained hundreds of people on the use of the system. In his basic training from Delta, he was taught not to try to move the containers when the system was energized, and he taught others that they should not be trying to move containers or unstick them when the system was on. Similarly, he was trained not to step on the rollers and the locks when the system was moving, and he trained DGS employees not to do so. He told DGS

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[10] Polinger testified he had never read the Boeing Delta Baggage Cargo Loading Manual.

employees "they should watch where they put their feet." And he stated that "if there was nowhere out of the way to stand . . . I would not be in the aircraft." Polinger knew, when he told Lopez to "back it up," that the transverse guides would lower into the floor when the system was energized, and he had used the cargo loading system more than a thousand times. All this demonstrates that Delta – and DGS and Polinger – obviously knew how the system worked and knew the fundamental hazards of the system. To suggest that Boeing nonetheless had a duty to warn Delta (and consequently DGS and Polinger) of a specific sub-category of risk – the so-called "trapping" hazard posed by the space within the transverse guide, which had never trapped anyone during the previous 16 years of use – is little short of incongruous.

In any event, the existence of a space within the transverse guide, along with all other features of the cargo loading system, would necessarily have been known to Delta when it decided to purchase the 767 model aircraft from Boeing. Indeed, the station manager for DGS at the Ontario airport at the time of Polinger's accident testified, when questioned about the dangers involved in moving cargo around the aircraft's cargo bay, that: "There is a lot of metal being pushed to and from, various pinch points," or "[p]laces where you could get pinched," and he further specifically confirmed that the transverse guides "come up and hold [the] containers in place," and "create a pinch point when they come down . . . ." And DGS supervisors and employees discussed "various aspects related to safety," including pinch points. In other words, the very hazard of which Polinger complains was known – not surprisingly – to Polinger's employer. Consequently, Boeing could not have had any duty to warn. (Cf. *Fierro v. International Harvester Co.* (1982) 127 Cal.App.3d 862, 866 ["[a] sophisticated organization like Luer [the employer of plaintiff's decedent, a truck driver who was killed in the course of his employment when the refrigerated truck he was driving caught fire after an accident] does not have to be told that gasoline is volatile and that sparks from an electrical connection or friction can cause ignition"; there was "no evidence that any feature of the skeleton unit [sold by the manufacturer and converted by Luer into a refrigerated unit] was unique or contained any component or capability which was known to [defendant

manufacturer] and which was not known to or readily observable by Luer"; "the absence of a warning to Luer did not substantially or unreasonably increase any danger that may have existed in using the [manufacturer's] unit"].)

Polinger argues at length that the evidence showed he did not know of the particular danger that caused him to be trapped and injured. But Polinger's actual knowledge is irrelevant to the existence of the sophisticated user defense, which "'eliminate[s] any duty to warn when the expected user population is generally aware of the risk at issue . . . .'" (*Johnson, supra*, 43 Cal.4th at p. 73.) "'Legal duties must be based on objective general predictions of the anticipated user population's knowledge, not case-by-case hindsight examinations of the particular plaintiff's subjective state of mind.'" (*Id.* at p. 74.) "'[T]he sophisticated user defense will always be employed when a sophisticated user should have, but did not, know of the risk.'"[11] (*Ibid.*)

Polinger insists there was no evidence "establishing that [he] should have known of the dangers concerning the pinch points . . . ." But of course there is such evidence; as we have already seen, Polinger's employer DGS knew that the transverse guides created pinch points in the system. If Boeing had no duty to warn Delta and DGS as sophisticated users of the system – and it surely did not – then it likewise cannot have had any duty to warn DGS's employees. This is not a case of a product which can come into the hands of unsuspecting persons untrained in its use; only persons employed by sophisticated users of the system – Delta and DGS – have occasion to be in the cargo hold of Delta's aircraft. Under these circumstances, there can be no doubt that "the

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[11] Even under the obvious danger rule, the test is objective. "Under the 'should have known' standard there will be some users who were actually unaware of the dangers. However, the same could be said of the currently accepted obvious danger rule; obvious dangers are obvious to most, but are not obvious to absolutely everyone. The obvious danger rule is an objective test, and the courts do not inquire into the user's subjective knowledge in such a case. In other words, even if a user was truly unaware of a product's hazards, that fact is irrelevant if the danger was objectively obvious." (*Johnson, supra*, 43 Cal.4th at p. 71.)

expected user population is generally aware of the risk at issue" (*Johnson, supra,* 43 Cal.4th at p. 74), thus eliminating Boeing's duty to warn.

In sum, there is no duty to warn of a product's potential danger "when the plaintiff has (or should have) advance knowledge of the product's inherent hazards." (*Johnson, supra,* 43 Cal.4th at p. 61.) That is the case here; Delta, DGS and Polinger were all "'generally aware of the risk at issue'" (*id.* at p. 73) and, as sophisticated users, "need not be warned about dangers of which [they were] already aware or should be aware." (*Johnson, supra,* 43 Cal.4th at p. 65.) There is no triable issue of fact regarding applicability of the sophisticated user defense in this case.

2. Polinger's defective design claim

In order to prove a claim for defective design or manufacture, a plaintiff must show that the defendant manufactured the product, the product was defective in its manufacture or design, the defect existed when the product left the manufacturer's possession, the defect was the cause of the plaintiff's injury, and the injury was caused by a reasonably foreseeable use of the product. (*Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 1370-1371.) The trial court concluded that Polinger's claims against Boeing based on a design or manufacturing defect in components of the system failed as a matter of law, because Polinger could not identify the manufacturer of any of the component parts he claims injured him (the PDUs, the pendant control box, and the transverse guides); could not prove that a design defect in the cargo handling system caused his injury; could not prove that any part of the system at the time of the accident was substantially similar to its condition when Boeing delivered the aircraft to Delta; and could not prove the transverse guide on which he was injured was designed and manufactured to Boeing specifications.

Polinger does not point to any evidence contradicting the trial court's findings, but instead argues that (1) the evidence on which Boeing relied was not admissible against Polinger, because it was premised on an admission by Delta, not by Polinger (and thus Boeing did not meet its burden of producing evidence to which Polinger had to respond); and (2) even if Boeing satisfied its burden to show Polinger could not prove Boeing

manufactured the components in question, Boeing "would still be liable for its defective design of the System as a whole." Both claims are without merit.

a. Boeing's evidence.

One of Polinger's theories is that a malfunction of the PDUs or the pendant control unit caused his injury, as the rollers did not stop moving when Lopez tried to shut off the system. Boeing presented evidence that, when the aircraft was delivered in 1987, all the PDUs in the cargo handling system had been manufactured for Boeing by Allied Signal, and there were 25 PDUs in the forward section of the forward compartment (where the accident occurred). After it delivered the aircraft to Delta in 1987, Boeing did not maintain, repair, refurbish or replace any of the component parts of the cargo loading system on the aircraft. The PDUs and lateral (transverse) guides are interchangeable, and can be used in any location in the cargo loading system. When an aircraft is overhauled, all PDUs and transverse guides are removed from the aircraft, and their return to any particular location in the aircraft is random. The aircraft was overhauled on August 17, 2006 (almost three years after the accident). In response to requests for admissions from Goodrich Corporation and Honeywell (defendants Polinger has dismissed from the lawsuit), Delta admitted that it did not know and was unable to determine whether there were any PDUs manufactured by Goodrich or Honeywell in the forward section of the forward compartment on the day of the accident, and did not know the date of manufacture of the PDUs that were located in that section. (Similarly, Delta admitted it did not know whether there were any transverse guide units manufactured by Boeing or Goodrich or Honeywell in the forward section on the day of the accident, and did not know the date of manufacture of the transverse guide units located there on the date of the accident.)[12]

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[12] Polinger's counsel declared that he and his consultants conducted an inspection of the aircraft on January 16, 2007 (five months after it was overhauled), to determine, among other things, which PDUs were located in the area of the incident. He attached one page of "pictures … reflect[ing] Allied Signal and Lucas Western PDUs found

Polinger's only response to the evidence just recited – which on its face shows that he cannot prove that Boeing manufactured the allegedly malfunctioning components that caused his injury, much less that those components were in a condition substantially similar to their condition when Boeing delivered the aircraft to Delta – is that Boeing relied on Delta's admissions, and that those admissions "could not and should not have been used against [Polinger]." Polinger cites Code of Civil Procedure section 2033.410, which provides that "[a]ny matter admitted in response to a request for admission is conclusively established against the party making the admission . . . " (Code Civ. Proc., § 2033.410, subd. (a)), and "is binding only on that party . . . ." (*Id.*, subd. (b).) Of course Polinger is correct that Delta's admissions are conclusive only as to Delta. But Polinger cites no authority, and we know of none, suggesting that an admission cannot function as evidence – albeit not conclusive evidence – for other purposes. Verified statements from any party – and an admission is a verified statement – necessarily constitute evidence of the matter stated. And, as Boeing points out, Delta has sole possession, custody and control of the aircraft and is thus the only source of evidence about its condition. Moreover, while Boeing did not cite it for the point in question, a declaration from Delta's William Ward, filed in support of Delta's motion for summary adjudication, likewise explained that there was "no way to determine who manufactured any of the PDUs or lateral guides which were in the forward section of the forward compartment of the aircraft at the time of [Polinger's] accident." In short, Boeing presented evidence that Polinger cannot establish an element of his cause of action, and Polinger in response failed to present any evidence showing a triable issue of material fact on the point. Consequently, Boeing is not liable for the defective manufacture of any of the components claimed to have injured Polinger.

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during the inspection." In his declaration in opposition to Telair's summary judgment motion, counsel stated that "at least one Allied Signal PDU was still in the forward section of the subject plane near the accident site." (A Boeing company manufactured the transverse guides (and various other parts) that were on the aircraft at the time of delivery in 1987, but in 1996 Boeing sold the facility that manufactured those parts to Lucas Western. Lucas Western was succeeded by TRW and then Goodrich.)

b. Polinger's claim of defective design of the system as a whole.

Polinger contends that even if he cannot prove Boeing manufactured the components in question, Boeing is liable for the allegedly defective design of the cargo loading system "as a whole."[13] One reason the system is defective, he claims, is that there was too much space within the housing of the transverse guide which created a point where his foot could become trapped, and there was no safety device, such as an emergency cord, inside the aircraft to allow him to stop the system.[14] It doesn't matter whether Boeing actually manufactured the transverse guide that injured him, Polinger says, because the manufacturer was following the design created by Boeing and sold by Boeing in 1996 to Lucas Western.

We need not debate, as the parties do at length, the existence of a triable issue as to whether the design of the transverse guide is the same as Boeing's original design. Polinger's claim suffers from a more fundamental problem: he cannot prove that a design defect in the transverse guide (or in the cargo handling system "as a whole") caused his injury. As the trial court observed at the hearing: "I find [Polinger] has not provided any evidence that would indicate the system was in any way defective. I find

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[13] The Supreme Court has identified three types of product defects: flaws in the manufacturing process, lack of adequate warnings, and design defects. A product is defectively designed "if it failed to perform as safely as an ordinary consumer would expect when used as intended or reasonably foreseeable, or if, on balance, the risk of danger inherent in the challenged design outweighs the benefits of the design." (*Brown v. Superior Court* (1988) 44 Cal.3d 1049, 1057.)

[14] Polinger also argues the system "is defectively designed as it constantly breaks down requiring persons to enter the cargo hold to try to unjam cargo," footing on the surface of the system is "unsafe and unsteady because so much of the surface is covered by roller balls, rails, rollers, and other moving parts," the pendant control device allowed the operator to be "outside the view of what was going on inside the cargo hold," and the system "was never designed to protect the safety of individuals inside the cargo hold."

that [Polinger] has provided no facts which would show that [Boeing] was on notice of any defect, and [Polinger] has the burden of proof."

Polinger insists that the testimony of his expert, Paul Youngdahl, created questions of fact as to whether a design defect caused his injuries, citing Youngdahl's opinion that the "pinch point" in the transverse guide was a design defect and a substantial factor in causing his injuries. (See *Stephen v. Ford Motor Co., supra,* 134 Cal.App.4th at p. 1373 ["[a] product liability case must be based on substantial evidence establishing both the defect and causation (a substantial probability that the design defect, and not something else, caused the plaintiff's injury)"; where "the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation"].) But Youngdahl's testimony does nothing to assist Polinger.

First, as we have seen, Delta and DGS were well aware of the hazards of the system, including the "pinch point" created by the transverse guides, eliminating any duty on Boeing's part to warn Delta (and consequently Polinger) of a hazard inherent in the cargo loading system. Under these circumstances, it is difficult to avoid the conclusion that, even if a design defect existed, it could not be the legal cause of Polinger's injury.[15] (Cf. *Johnson, supra*, 43 Cal.4th at p. 65 ["'the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm

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[15] During argument at the hearing, the trial court observed: "Let's assume that is a design defect [the transverse guide design]. [¶] You have a causation issue here, in my estimation, because if that is a defect, he still knows that he is not supposed to have his foot there. He still knows that if the power device unit is in operation, he shouldn't have his foot there. [¶] Doesn't that cancel out any design defect, and doesn't that make the causation on the plaintiff as opposed to the defendant?" And again: " . . . I am concerned because I don't see causation. I don't. I see [Polinger] being trained not to do what he did. [¶] I also see this problem of the system being employed worldwide and operating, to the best of our knowledge, without too much of a glitch. I mean, if we had many bodies here, I would be worried; but [Polinger] hasn't show[n] there was even one claim that was made against [Boeing] that would put [Boeing] on notice that in fact this is a defective system."

resulting from those risks suffered by the buyer's employees or downstream purchasers'"].)

Second, the trial court sustained Boeing's objections to virtually all of Youngdahl's testimony, including his opinion that the cargo loading system was defectively designed. As will appear, because there was no foundation for Youngdahl's opinion, the trial court's ruling was not an abuse of its discretion.

Youngdahl is a mechanical engineer with a doctorate in mechanical engineering from the University of Michigan. The evidence of his qualifications to opine on the defective design of the aircraft's cargo loading system was this:

> "I have extensive experience in designing mechanical systems and protective structures, and have been involved in developing warnings for consumers. I have testified on numerous occasions as an expert witness on issues, including but not limited to design, protective systems, and warnings in courts throughout California and the rest of the United States. I have spent a considerable part of my career analyzing products to determine if a product is defectively designed or lacks adequate warnings, instructions, or safety systems."[16]

Youngdahl based his opinion on photographs of a 767-300 cargo loading system, "DVD's and photographs from the [January 16, 2007] inspections [of the aircraft] at LAX; measurements taken by Alvin Lowi," and other litigation materials, and concluded that design defects in the cargo loading system were a substantial factor in causing Polinger's injuries. Youngdahl described the system and its hazards,[17] and concluded

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[16] While Youngdahl's declaration also stated that his curriculum vitae was attached, no such document appears in the record.

[17] Youngdahl observed there were numerous points where human beings could become trapped, footing was unstable because of the various moving parts comprising the system, and "[t]he presence of cargo further reduces the amount of space . . . where a person can stand without being exposed to hazards." Boeing did nothing to eliminate "a host of hazards" encountered by persons who had to enter the cargo hold to get jammed containers back on track. "One of the many hazards" included the transverse guides,

that Boeing "could have and should have" (1) eliminated or reduced the space in the transverse guides, (2) provided places inside the cargo hold where an operator could stand and gain stable footing without being exposed to pinch points where their limbs could be trapped, (3) "[d]esign[ed] a system that is completely automated that does not require a person to enter the cargo hold to help the system un-jam containers," and (4) included a device, such as an emergency shut off cord "that could run along the side walls of the cargo hold," that would allow a person inside to shut off the system in the event of an emergency.[18]

Boeing's objections to Youngdahl's testimony on foundational grounds pointed out that Youngdahl "has never worked for Boeing, and . . . has had no prior experience with aircraft cargo systems, let alone the 767-300 at issue here. . . . In addition, Youngdahl does not profess to have ever been inside a 767 cargo hold and does not claim to have done any testing or observation."

We detect no basis for finding any abuse of discretion in the trial court's ruling sustaining Boeing's objections. Youngdahl does not even purport to have any expertise

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which "had enough clearance within the guides to allow a human foot to become trapped . . . ." On the last point, Youngdahl stated that one portion of the housing of the transverse guide was higher, because a lug was located in that portion and more material was required so the lug could withstand impacts from containers. He opined that "[i]f Boeing had raised the height of the transverse guide housing at least as high as the portion of the transverse guide that had the lug nut, Boeing could have prevented [Polinger's] foot from getting trapped inside the space when the guide lowered into the floor. Eliminating pinch points in automated and powered systems such as the Powered Cargo Loading System is a basic safety engineering principal."

[18] Youngdahl also professed himself "highly critical" of Boeing's failure to "conduct a basic safety engineering analysis" on the system, citing testimony from Darrin Noe of Boeing, who testified as Boeing's person most knowledgeable. Noe, who was not at Boeing when the system was designed, testified that he found no documentation "with regard to safety analysis of this system," and that he inquired of several of the original designers of the system about "failure mode and effects analyses," but had no information that such analyses were performed with regard to the cargo loading system at issue in this case.

in aircraft cargo loading systems. His experience is in "designing mechanical systems and protective structures," "developing warnings for consumers," and "analyzing products to determine if a product is defectively designed . . . ." But none of the "mechanical systems" or "products" is identified or even categorized and, as we have seen, this is not a case involving a product offered for sale to ordinary consumers. Moreover, Youngdahl does not purport ever to have seen the 767-300 cargo loading system, and offered his opinions based on photographs of the system. This is hardly a sufficient foundation for opining, for example, that Boeing "could have and should have . . . [d]esign[ed] a system that is completely automated that does not require a person to enter the cargo hold to help the system un-jam containers." Nor did Youngdahl offer any facts to support his conclusion that Boeing "could have" designed a "completely automated" system, or even that the elimination of space in the transverse guide was feasible. (Cf. *Brown v. Superior Court, supra,* 44 Cal.3d at p. 1057 [a product is defectively designed "if, on balance, the risk of danger inherent in the challenged design outweighs the benefits of the design"].)

Polinger insists the trial court erred because on summary judgment it was required to liberally construe the declarations of the plaintiff's experts. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 125-126.) But liberal construction cannot save Youngdahl's declaration. An expert declaration is sufficient if it "establishes the matters relied upon in expressing the opinion, that the opinion rests on matters of a type reasonably relied upon, and the bases for the opinion." (*Sanchez v. Hillerich & Bradsby Co.* (2002) 104 Cal.App.4th 703, 718 (*Sanchez*).) The only bases for Youngdahl's opinion were his own experience and the information given to him about the cargo loading system, including photographs. He then opined the system contained design defects, including too much space in the housing of the transverse guide. But he cited no facts to support that conclusion: no literature concerning cargo loading system design, no studies by other experts in the field, no research on (or any actual observation of) this or

any other cargo loading system – in short, nothing other than his experience as a mechanical engineer analyzing defects in unidentified consumer products.[19] His opinion does not "rest[] on matters of a type reasonably relied upon" (*ibid.*) in considering whether a design is defective, and neither *Sanchez*, nor any of the other cases Polinger cites finding expert declarations sufficient to prevent summary judgment, supports a like conclusion in this case.

In sum, there was no error in the trial court's evidentiary rulings or in its order granting Boeing's motion for summary judgment.

D. Delta was not entitled to summary judgment.

If an employee (Polinger) of an independent contractor (DGS) comes under the control and direction of the other party to the contract (Delta), the courts hold that a dual employment or "special employment" relation exists. If so, the special employee's only remedy against the special employer is through the workers' compensation system. (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 175 (*Kowalski*). Delta sought summary judgment on this ground, and the trial court granted Delta's motion, stating: "Based on [Polinger's] own allegations, his relationship falls within the definition of special employment and, therefore, he is not entitled to bring this action against Delta."

We conclude the trial court erred. The existence *vel non* of the special employment relationship "'is generally a question reserved for the trier of fact,'" and Delta had the burden to prove, as a matter of law, that it had "'the right to control the details of the work'" Polinger performed. (*Kowalski, supra*, 23 Cal.3d at pp. 175, 177, fn. 9.) Delta did not meet that evidentiary burden. We summarize the relevant legal

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[19] Polinger claims that Boeing "did not (and could not) challenge the qualifications of Dr. Youngdahl who describes his education and extensive engineering background and attaches his curriculum vitae." This is simply not so; Boeing challenged Youngdahl's qualifications in every objection it made, and no curriculum vitae was attached to Youngdahl's declaration.

principles, and then explain why the evidence Delta presented did not establish a special employment relationship.

1. The legal criteria.

As *Kowalski* tells us, "[t]he possibility of dual employment is well recognized in the case law." (*Kowalski*, *supra*, 23 Cal.3d at p. 174.) "'Where an employer sends an employee to do work for another person, and both have the right to exercise certain powers of control over the employee, that employee may be held to have two employers – his original or "general" employer and a second, the "special" employer.'" (*Ibid.*) In determining whether a special employment relationship exists, "the primary consideration is whether the special employer has '"[t]he right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not . . . ."'" (*Id.* at p. 175.) But whether the right to control existed or was exercised "'is generally a question of fact to be resolved from the reasonable inferences to be drawn from the circumstances shown.'" (*Ibid.*)

In this case, Polinger's general employer, DGS, contracted with Delta to provide ground services as an independent contractor, and the contract provided that all personnel utilized by DGS in doing so "shall be employees of [DGS] and under no circumstances shall be deemed employees of Delta." However, a contract is not conclusive evidence of the right to control (because a contract cannot "'place an employee in a different position from that which he actually held'"), so courts look to a number of factors as indicia of a special employment relationship. (*Kowalski*, *supra*, 23 Cal.3d at p. 176.) Paramount among these is whether the alleged special employer "'exercises control over the details of [an employee's] work.'" (*Ibid.*; see also *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1067, fn. 9 [noting that in *Kowalski*, the Court "reviewed eight factors that generally bear on that question [whether evidence was sufficient to support the jury's

finding of lack of a special employment relationship], e.g., the right to control, right to discharge, nature and duration of the work, source of the tools and equipment, etc."].)[20]

2. Delta's evidence.

When it answered Polinger's second amended complaint in February 2007, Delta did not assert that Polinger was its special employee. In August 2007, however, after conducting discovery, Delta sought (and was permitted) to amend its answer to assert the special employment relationship as an affirmative defense, and at the same time sought summary judgment on that ground. Delta relied principally on Polinger's responses to two of Delta's requests for admissions, and corresponding explanatory interrogatory answers, concerning Delta's right to control the manner and method of Polinger's work. Specifically:

- Delta asked Polinger to "[a]dmit that Delta did not have the right to control the manner in which Polinger performed his work in loading cargo for DGS." Polinger responded, "Deny" (after objecting to the request as vague, ambiguous, overbroad, and calling for a legal conclusion, expert opinion and attorney work product).
- Similarly, Delta asked Polinger to "[a]dmit that Delta did not have the right to control the method Polinger used to perform his work in loading cargo for DGS," and Polinger responded, "Deny," making the same objections.

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[20] Control over the details of the employee's work "'strongly supports the inference that a special employment exists,'" but the fact that instructions are given as to the result to be achieved does not require the conclusion that a special employment relationship exists. (*Kowalski, supra,* 23 Cal.3d at pp. 176-177.) The power to discharge is "'strong evidence'" of a special employment relationship. (*Id.* at p. 177.) The payment of wages is not determinative. (*Ibid.*) Other factors to be taken into consideration include whether the work is part of the employer's regular business (*ibid.*) and "whether the worker consented to the employment relationship, either expressly or impliedly, and . . . whether the parties believed they were creating the employer-employee relationship." (*Id.* at p. 178.)

- Delta's accompanying interrogatories asked, with respect to each of Polinger's responses "that is not an unqualified admission," for a statement of the facts upon which he based his response. Polinger answered, with respect to each of the two responses just quoted, as follows:

> "[A]though [Polinger] was not an employee of Delta, [DGS's] goals, targets, and work in and around Delta planes were set by Delta with the express goal of [DGS] pleasing [its] customer Delta. Delta set procedures for when and how fast cargo should be loaded onto the planes. [DGS] is a subsidiary of Delta and at the time of the incident was following procedures set by Delta. Also, as operator of the plane, Delta had the right power and ability to control the actions of anyone entering, exiting and working near their planes."

Relying on these responses from Polinger, Delta contends that "[n]o more is needed to demonstrate that the trial court correctly granted Delta's motion for summary judgment, based on [Polinger's] own admissions and allegations." We cannot agree.

As a preliminary note, Polinger's "allegations" are not evidence and do nothing to satisfy Delta's burden of proving that Delta was Polinger's special employer.[21] More importantly, Polinger did not admit that Delta exercised, or had the right to exercise, control over the details of Polinger's work. (*Kowalski, supra,* 23 Cal.3d at p. 176.) Indeed, Polinger did not "admit" anything. He merely denied – that is, refused to admit – that Delta "did not have the right to control" the manner and method in which he performed his work. Delta's contention that this is evidence – much less conclusive

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[21] Even if the allegations Delta cites were proved, they are not indicia of a special employment relationship. The allegations Delta refers to are (1) Polinger's allegation in the complaint that Delta was liable for its "[f]ailure to properly supervise, educate, train, monitor and test workers including employees and independent contractors who were responsible for" handling the cargo, and (2) Polinger's proposed undisputed fact that "[n]either Boeing nor Delta nor anyone else ever mandated, warned, or instructed that only one person should be operating the Powered Cargo Loading System."

evidence – that Delta was Polinger's special employer is simply wrong, for a host of reasons.

First, Delta is wrong when it asserts that the denial of a request for admission is itself a binding admission, and that "[t]he clear language of the statute, the case law, and simple logic, require that any matter admitted *or denied* in response to an RFA [request for admission] is binding." (Italics added.) Delta is mistaken on all counts. As to the statute, Code of Civil Procedure section 2033.410 clearly states that "[a]ny matter *admitted* in response to a request for admission is conclusively established against the party making the admission . . . ." (Code Civ. Proc., § 2033.410, subd. (a), emphasis added.) It does *not* say, as Delta suggests, that any matter "admitted or denied" is conclusively established. Nor does it say that any "response" is conclusively established. The statute requires each answer to "[a]dmit" or "[d]eny" so much of the matter involved in a request as is true or untrue, respectively. (Code Civ. Proc., § 2033.220, subd. (b)(1)&(2).) Just as with the denial of allegations in a complaint, the denial of a request for admission requires the requestor to prove the point – and the statute allows an award of expenses and attorney fees against a party who fails to admit the truth of a matter that is later proved true. (*Id.*, § 2033.420, subd. (a).) In short, nothing in the statute supports Delta's claim that Polinger's denial of its request for admission is actually an admission binding on him. Nor are we aware of any case law, and Delta cites none, supporting that notion.

As for the claim that "simple logic" requires us to conclude that the denial of a request for admission is really a binding admission, we must beg to differ. Indeed, the notion that a denial should be construed to have the binding effect of an admission, because Delta chose to couch its request for admission in the negative, is specious. If Delta wished to obtain an admission from Polinger that it (Delta) had the right to control the manner or method in which he performed his work, it should have asked Polinger to admit precisely that. Instead, Delta formulated a request that elicited a denial, and neither the statute nor case law permits us to construe a denial as a binding admission.

Second, we would in any event view with some doubt the propriety of basing a finding that Delta is Polinger's special employer on nothing more than evidence that *the employee believed* that Delta had "the right to control" the method or manner in which Polinger performed his work, entirely without reference to any underlying facts illustrating the basis for this "right to control" or showing the exercise of the right to control. The cases repeatedly state that "whether the special employer exercises control over the details of the employee's work" is "crucial to a finding of special employment relationship." (*Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal.App.3d 575, 580 (*Santa Cruz Poultry*).) Whether there is control is a question of fact, and it is not a question that can be determined solely on the basis of an employee's belief or admission that the alleged special employer has, in the abstract, "the right to control" his work. The resolution of the question of control necessarily rests on the underlying facts, none of which appears in Delta's evidence. (*Kowalski, supra,* 23 Cal.3d at p. 175 [whether the right to control existed or was exercised is generally a question of fact "'to be resolved from the reasonable inferences to be drawn from the circumstances shown'"].) Just as the contract between Delta and DGS – which specifically stated that DGS's employees were *not* employees of Delta – cannot "'place an employee in a different position from that which he actually held'" (*id.* at p. 176), neither can the employee's own belief (or admission) do so. (See *Santa Cruz Poultry, supra*, 194 Cal.App.3d at p. 583 ["whatever the employee's intentions, if any, regarding the nature of his legal status vis-à-vis [the special employer], ***in fact*** he worked under the supervision and control and at the pleasure of [the special employer], exactly like any employee of [the special employer]"], emphasis added.)

In short, the only evidence Delta presented to establish that, as a matter of law, it was Polinger's special employer consisted of Polinger's denial of a request that he admit that Delta "did not have the right to control" the method by and manner in which Polinger performed his work. The statute does not permit us to construe Polinger's denial as a

conclusive admission that Delta *did* have the right to control his work within the meaning of the law governing special employment relationships.[22] And, while Polinger's responses may constitute some evidence on the issue of control, the employee's views on the issue cannot be dispositive; the issue must be resolved "'from the reasonable inferences to be drawn from the circumstances shown.'" (*Kowalski*, *supra*, 23 Cal.3d at p. 175.) Delta presented no evidence of the underlying circumstances of its special employment relationship with Polinger: no evidence that Polinger worked under Delta's direct supervision and control, no evidence that Delta "exercise[d] control over the details of [Polinger's] work" (*id.* at p. 176), and indeed, no declarations from anyone at Delta on any aspect of its claimed special employment relationship. Polinger, on the other hand, submitted a declaration showing that his work at DGS involved unloading cargo for multiple airlines, not just Delta; that Delta could not discharge, suspend or discipline him; that his discovery responses were not meant to convey that Delta controlled his day-to-day employment, and indeed that DGS did so, making ultimate decisions on matters such as the configuration of cargo loads, which employees would load and unload from which aircraft and which airline, and so on. Triable issues of fact clearly exist on the question whether Delta was Polinger's special employer. (Cf. *Thomas v. Edgington Oil Co.* (1977) 73 Cal.App.3d 61, 64 ["where the alleged special employer is not, at the time of the injury or in connection with the specific task to be performed, exercising control over the details of the work, no special employment exists even though, at some other time and in connection with some other task, such detailed control may have been exercised"].) Delta clearly did not meet its burden to show, as a matter of law, the existence of a special employment relationship.

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[22] Ironically, while Delta views Polinger's denial that Delta did not have "the right to control" Polinger's work as conclusive of the existence of a special employment relationship, Delta at the same time objected to Polinger's declaration that he "never believed that [he] was in a special employment relationship with Delta" on the ground it was a legal conclusion.

DISPOSITION

The judgments in favor of Telair International, Inc. and The Boeing Company are affirmed. The judgment in favor of Delta Air Lines, Inc. is reversed and the cause is remanded to the trial court with instructions to vacate its order granting Delta's motion for summary judgment and enter a new order denying the motion. Telair and Boeing are to recover their costs on appeal. Polinger shall recover the costs of his appeal of the judgment in favor of Delta.

BAUER, J.*

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

We concur:

FLIER, Acting P.J.

BIGELOW, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.